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No. 93-1729

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

DOUGLAS NYHUIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Double Jeopardy Clause, a court's consideration of petitioner's cocaine trafficking when it imposed sentence for a marijuana offense barred subsequent prosecution and sentencing of petitioner for a cocaine offense.

2. Whether petitioner's Florida prosecution violated any "transactional" or "use" immunity previously granted in Michigan.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Ball v. *United States*, 470 U.S. 856 (1985)	9
Bullington v. *Missouri*, 451 U.S. 430 (1981)	5, 6
Kastigar v. *United States*, 406 U.S. 441 (1972)	11
North Carolina v. *Pearce*, 395 U.S. 711 (1969)	5
Schiro v. *Farley*, 114 S. Ct. 783 (1994)	5, 6, 8
Sekou v. *Blackburn*, 796 F.2d 108 (5th Cir. 1986)	7
United States v. *Cruce*, 21 F.3d 70 (5th Cir. 1994)	7
United States v. *Garcia*, 919 F.2d 881 (3d Cir. 1990)	7
United States v. *Koonce*:	
945 F.2d 1145 (10th Cir. 1991), certs. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992)	7, 8, 9
112 S. Ct. 1705 (1992)	9
United States v. *Mack*, 938 F.2d 678 (6th Cir. 1991)	7
United States v. *McCormick*, 992 F.2d 437 (2d Cir. 1993)	7, 8, 9
United States v. *Restrepo*, 946 F.2d 654 (9th Cir. 1991), cert. denied, 112 S. Ct. 1564 (1992)	8
United States v. *Troxell*, 887 F.2d 830 (7th Cir. 1989)	7
United States v. *Williams*, 935 F.2d 1531 (8th Cir. 1991), cert. denied, 112 S. Ct. 1189 (1992)	7
Williams v. *Oklahoma*, 358 U.S. 576 (1959)	6, 8

Constitution, statutes and rules:

U.S. Const. Amend. V (Double Jeopardy Clause)	5, 8
18 U.S.C. 922(h)(1) (1982)	9

Statutes and rules–Continued:

	Page
18 U.S.C. 6002	10
18 U.S.C. App. 1202(a)(1) (1982)	9
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2
21 U.S.C. 848	2
28 U.S.C. 994(*l*)	8
Sentencing Guidelines:	
Pt. 3D	8
Pt. 5G:	
§ 5G1.3(b)	8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 8 F.3d 731. The opinion of the district court (Pet. App. 65a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1993. A petition for rehearing was denied on February 2, 1994. Pet. App. 63a-64a. The petition for a writ of certiorari was filed on May 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to distribute and to possess with intent to distribute cocaine (21 U.S.C. 841(a)(1), 846). Pet. App. 3a, 13a. The district court sentenced petitioner to 324 months' imprisonment (concurrent with an earlier federal sentence in Michigan), to be followed by five years' supervised release. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1a-62a.

1. Petitioner conspired with George Marian and others to possess more than five kilograms of cocaine with the intent to distribute it. At trial, Marian and two of petitioner's drug couriers described how petitioner had arranged for cocaine to be delivered from Marian in Florida to petitioner in Michigan. Pet. App. 11a-12a.

2. In an earlier case, petitioner and the United States Attorney's Office for the Western District of Michigan had entered an agreement pursuant to which petitioner agreed to plead guilty to having operated a continuing criminal enterprise (CCE) involving marijuana, in violation of 21 U.S.C. 848. The government agreed, *inter alia*, "not to bring additional criminal charges against [petitioner] in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by [petitioner] in the proffer already made to the government." Pet. App. 7a-9a, 92a.

The Michigan plea agreement was entered on December 13, 1989, and petitioner testified the next day before a federal grand jury in Michigan. In that testimony, however, petitioner concealed his cocaine deals and relationship with George Marian. After the government independently developed evidence of petitioner's

involvement with Marian, petitioner's plea agreement was revised to allow the government to recommend a 15-year, rather than a ten-year, sentence on the marijuana CCE count. Petitioner's offenses occurred before the advent of the Sentencing Guidelines. In July 1990, the sentencing court, after considering evidence of petitioner's cocaine trafficking as well as the marijuana CCE offense of conviction, imposed a term of 14 years' imprisonment. Pet. App. 9a-10a.

3. Petitioner was subsequently indicted in the Middle District of Florida for conspiracy to distribute and to possess with intent to distribute cocaine. Pet. App. 11a. Before trial, petitioner moved to dismiss the indictment, claiming that prosecution would constitute double jeopardy and would violate the immunity he had previously been granted. Following an evidentiary hearing, the district court denied the motion. *Id.* at 65a-87a.

The court held that neither "transactional" nor "use" immunity barred petitioner's Florida prosecution for cocaine trafficking. Pet. App. 79a-80a. The court explained that "[w]hile [petitioner] was granted transactional immunity in the Western District of Michigan, such transactional immunity will not bar this prosecution pursuant to the Florida indictment." *Ibid.* The court also explained that petitioner's use immunity would not be violated because the Florida case "was the result of an investigation conducted by [DEA] Agent Waller through sources independent of [petitioner's] proffer, Grand Jury testimony, and the information given the authorities in the Western District of Michigan." *Id.* at 79a.

The district court further held that the Florida prosecution did not violate petitioner's double jeopardy rights. Pet. App. 80a-87a. It explained that petitioner had been neither tried nor convicted in Michigan for the

cocaine trafficking conspiracy that was the subject of the Florida prosecution. *Id.* at 83a. The court deemed it "a far more difficult issue" whether a double jeopardy bar was raised by the Michigan court's consideration of petitioner's Florida cocaine trafficking in sentencing petitioner for the marijuana offense. *Id.* at 85a. It concluded, however, that this issue did not justify dismissing the indictment because it was solely a potential issue of "multiple punishment" that would not be "ripe" until sentencing. *Id.* at 86a-87a. At sentencing, the district court rejected petitioner's multiple punishment claim. Gov't C.A. Br. 3.

4. The court of appeals affirmed. Pet. App. 1a-62a. It held that neither double jeopardy nor any prior grant of immunity precluded petitioner's prosecution and sentencing in Florida for the cocaine trafficking conspiracy there. *Id.* at 13a-50a.

With respect to petitioner's double jeopardy claim, the court of appeals determined that the crimes charged in Michigan and petitioner's Florida transactions with George Marian involved different conspiracies. Pet. App. 22a-33a. It also found no merit in petitioner's claim that he could not separately be punished for the cocaine traffick-ing conspiracy in Florida because the Michigan court had considered that conduct in sentencing him for the marijuana CCE offense. *Id.* at 33a-41a.

The court of appeals then held that the district court had correctly rejected petitioner's immunity claims. Pet. App. 41a-50a. It found that the government had not violated the Michigan plea agreement because that agreement covered only transactions that were described in petitioner's pre-agreement proffer; the Marian cocaine transactions had not been described (and were denied by petitioner in his grand jury appearance the day after entering the plea); and the government established

independent investigatory sources for petitioner's participation in a cocaine-distribution conspiracy with Marian. *Id.* at 48a-50a.

ARGUMENT

1. Petitioner contends (Pet. 25-51) that the Double Jeopardy Clause precluded the Florida court from sentencing him for his cocaine trafficking conspiracy because the Michigan court had previously considered that cocaine trafficking when sentencing him for the marijuana offense. That claim lacks merit.

As this Court's recent decision in *Schiro* v. *Farley*, 114 S. Ct. 783 (1994), makes clear, a court's consideration of information at sentencing does not constitute "jeopardy" for any "offence" (U.S. Const. Amend. V) other than the one of conviction. The defendant in *Schiro* was tried but not convicted on charges of intentional murder. He argued that the Double Jeopardy Clause prevented the sentencing court from considering the intentional murder as an aggravating circumstance in imposing a death sentence for the offense of conviction (killing during a rape). 114 S. Ct. at 789. The Court rejected that contention, holding that its "prior decisions are inconsistent with the argument that a first sentencing proceeding can amount to a successive prosecution." *Ibid.* (citing cases).[1] It added:

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[1] *Schiro* was a capital case, and the question whether "jeopardy" had attached was therefore more complex than in noncapital cases such as this one. See *Bullington* v. *Missouri*, 451 U.S. 430, 446 (1981) (because death penalty proceeding "was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available * * * with respect to the death penalty"; distinguishing noncapital cases such as *North Carolina* v. *Pearce*, 395 U.S. 711 (1969)). *Schiro*, in turn, explained that "the capital sentencing scheme at issue [in *Bullington*] 'differ[ed] significantly

> We have also upheld the use of prior convictions to enhance sentences for subsequent convictions, even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried. In short, as applied to successive prosecutions, the Clause is written in terms of potential or risk of trial and conviction, not punishment.

Id. at 789-790 (citations and internal quotation marks omitted).

Similarly, in *Williams* v. *Oklahoma*, 358 U.S. 576, 585-586 (1959), the Court made clear that a defendant is not placed in "jeopardy" by a sentencing court's consideration of information regarding criminal conduct related to, yet legally distinct from, the offense of conviction. There, a defendant, after being sentenced to life imprisonment for murder, was separately charged with the kidnaping that led to his victim's death. In imposing a death sentence for this kidnaping, the sentencing court expressly relied on the ensuing murder. *Id.* at 581. This Court held that no double jeopardy violation had occurred, explaining that "in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing [defendant] a second time for the same offense." *Id.* at 586.

The court of appeals was therefore correct in holding that "the Double Jeopardy Clause does not bar prosecution and punishment for criminal conduct that

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from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing.'" 114 S. Ct. at 790 (quoting 451 U.S. at 438).

has already been considered and used as the basis for a sentence enhancement in an earlier prosecution." Pet. App. 41a. Other federal courts of appeals have reached similar conclusions. See, *e.g.*, *United States* v. *Cruce*, 21 F.3d 70 (5th Cir. 1994) (double jeopardy not violated by prosecution and sentence for bank fraud offense that a prior sentencing court had already considered in imposing sentence for separate bank fraud offense); *United States* v. *Mack*, 938 F.2d 678, 679 (6th Cir. 1991) (agreeing with holdings of other courts of appeals that "double jeopardy is not implicated when a defendant is indicted for an incident of conduct previously used to increase the length of his sentence for a separate offense"); *United States* v. *Williams*, 935 F.2d 1531, 1538 (8th Cir. 1991) ("Although the court in the [earlier] case inquired into the [later] offense during the sentencing hearing, at no time was Williams put 'in jeopardy' for the [later offense] until the actual trial for [it]."), cert. denied, 112 S. Ct. 1189 (1992); *United States* v. *Garcia*, 919 F.2d 881, 886 (3d Cir. 1990) ("consideration of a prior bad act at sentencing will not ordinarily create a double jeopardy bar to a later prosecution for that bad act"); *United States* v. *Troxell*, 887 F.2d 830, 836 (7th Cir. 1989) ("Mere mention of a bad act in sentencing for a crime does not amount to attachment of jeopardy for that act."); *Sekou* v. *Blackburn*, 796 F.2d 108, 111 (5th Cir. 1986) ("Consideration of criminal conduct as an aggravating circumstance does not convert the sentencing proceeding into a trial, conviction, or punishment for the criminal activity so considered.").

Petitioner contends (Pet. 27) that the court of appeals' decision conflicts with *United States* v. *Koonce*, 945 F.2d 1145 (10th Cir. 1991), certs. denied, 112 S. Ct. 1695 and 112 S. Ct. 1705 (1992), and *United States* v. *McCormick*, 992 F.2d 437 (2d Cir. 1993). In *Koonce* and *McCormick*,

certain criminal conduct (distinct from the offenses of conviction) had been incorporated into the Sentencing Guidelines base offense levels used in sentencing the defendants. The government then sought to prosecute the defendants for that criminal conduct. The Tenth and Second Circuits held that the prosecutions were barred by the Double Jeopardy Clause. Both cases rest on three premises: (1) a sentencing court that factors related criminal conduct into the base offense level is "punishing" the defendant for that conduct; (2) Congress did not intend for defendants to be punished separately for the offense of conviction and relevant conduct factored into the base offense level; and (3) it is not enough that the sentences be structured to run concurrently rather than consecutively. See *Koonce*, 945 F.2d at 1149-1154; *McCormick*, 992 F.2d at 439-442. We believe that each of those premises is flawed.[2]

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[2] First, as made clear by this Court's decisions in cases such as *Schiro* v. *Farley*, *supra*, and *Williams* v. *Oklahoma*, *supra*, a defendant is "punished" at sentencing only for the offense(s) of conviction. See *Schiro*, 114 S. Ct. at 789; *Williams*, 358 U.S. at 585. The Sentencing Guidelines "do not * * * create new offenses requiring separate punishment"; rather, "the statutory penalties to which the defendant was exposed have remained unchanged with the enactment of the Guidelines." *United States* v. *Restrepo*, 946 F.2d 654, 657, 660 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1564 (1992). Second, there is no indication that Congress intended to preclude separate punishment for related offenses. Instead, Congress directed the Sentencing Commission to promulgate specific guidelines regarding the appropriate "incremental penalties" and concurrent-versus-consecutive prison terms for various related crimes. See 28 U.S.C. 994(*l*). The Commission has responded with various "grouping" rules where multiple crimes are tried jointly (Guidelines Pt. 3D) and a specific provision addressing sentences for defendants serving previous terms for related offenses (Guidelines § 5G1.3(b)). The latter provision reflects an intent not to bar successive prosecutions, but

Although the government unsuccessfully sought review of the issue in *Koonce*, 112 S. Ct. 1705 (1992), the present case does not raise that issue. The courts in *Koonce* and *McCormick* acknowledged the existence of a substantial body of authority holding that a sentencing court's consideration of a related but uncharged crime does not generally bar later prosecution for that crime. Those courts asserted, however, that a different rule should apply to criminal conduct that has previously been incorporated into the defendant's base offense level under the Sentencing Guidelines. See *Koonce*, 945 F.2d at 1152 ("[Prior] cases * * * are distinguishable, as none involved punishment for conduct that was previously aggregated into a defendant's base offense level for a related crime."); *McCormick*, 992 F.2d at 441-442 & n.5. Because petitioner acknowledges that "his Michigan conviction and sentence occurred prior to the effective date of the U.S. Sentencing Guidelines," Pet. 40, and he was not sentenced in Michigan under the

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rather to ensure only that "the resulting term of imprisonment * * * be the same as would have resulted from a single prosecution." *McCormick*, 992 F.2d at 442 (Mahoney, J., dissenting). Finally, the courts' reliance on *Ball* v. *United States*, 470 U.S. 856 (1985), was misplaced. See *Koonce*, 945 F.2d at 1151, 1153-1154; *McCormick*, 992 F.2d at 440-441. *Ball* held that a defendant could not be separately punished for what was, in every possible instance under the *Blockburger* test, the "same offence": a felon possessing a firearm (18 U.S.C. 922(h)(1) (1982)) and that same felon receiving that same firearm (18 U.S.C. App. 1202(a)(1) (1982)). 470 U.S. at 861-864. Because "Congress did not intend [the defendant's] conduct to be punishable under both [statutes], the only remedy consistent with the congressional intent is for the [sentencing court] to exercise its discretion to vacate one of the underlying convictions." *Id.* at 864. Here, in contrast, it cannot seriously be claimed that the offenses are in all instances the "same." See Pet. App. 22a-33a.

Guidelines, his subsequent prosecution in Florida does not implicate the factor that was dispositive in *Koonce* and *McCormick*.

2. Petitioner next contends (Pet. 51-62) that the Florida prosecution violated both the "transactional" and "use" immunity he had previously been granted in Michigan. The courts below properly rejected those factbound claims.

a. Under the terms of the Michigan plea agreement, "[t]he government agree[d] not to bring additional criminal charges against [petitioner] in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by [petitioner] in the proffer already made to the government." Pet. App. 92a. That agreement did not bar the prosecution at issue here. The cocaine conspiracy charge brought in Florida did not arise out of petitioner's "involvement in the distribution of marijuana" or any "transactions disclosed by [petitioner] in the proffer already made to the government." To accept petitioner's contention that the latter phrase should be construed to include cocaine dealings concealed by him prior to execution of the agreement and only later discovered by the government (Pet. 58-59) would, as the court of appeals put it, "be an endorsement of the strategy of telling a little and hiding a lot." Pet. App. 49a. Moreover, the Florida indictment cannot be said to constitute "additional criminal charges * * * in the Western District of Michigan." See *id.* at 92a.

b. The courts below were also correct in finding that the Florida prosecution was not based, directly or indirectly, on information provided by petitioner in Michigan pursuant to his plea agreement. Though petitioner was not granted formal "use" immunity in Michigan (see 18 U.S.C. 6002), the courts below assumed

that he was equally protected by an "informal" grant of use immunity. See Pet. App. 44a. The district court conducted extensive evidentiary hearings to determine whether the government had carried its burden, under *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), of proving that its evidence was "derived from a legitimate source wholly independent of the [immunized] testimony." The district court found that the instant prosecution "was the result of an investigation conducted by [Florida-based DEA] Agent Waller through sources independent of [petitioner's] proffer, Grand Jury testimony, and the information given the authorities in the Western District of Michigan." Pet. App. 79a.[3] The court of appeals affirmed that finding as not clearly erroneous (*id.* at 45a-47a), and that fact-specific holding warrants no further review.

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[3] Petitioner, who initially concealed his cocaine trafficking from the government, nonetheless contends (Pet. 52) that Agent Waller learned the names of potential witnesses Mark DeVries and James Muth as a result of information he provided to the Michigan authorities in November 1989. As the government's court of appeals brief explained, however, Michigan DEA agents had knowledge of these witnesses' participation in drug trafficking dating back to 1987, and Florida DEA Agent Waller's attention was directed to these witnesses following a January 1990 debriefing of an entirely different individual in Miami. See Gov't C.A. Br. 32-33. Petitioner's speculation that it was his own testimony about marijuana dealings that "prompted" these witnesses ultimately "to cooperate" with the government (Pet. 53) is insufficient to negate the government's showing that it made no direct or indirect "use" in Florida of the information provided by petitioner in Michigan.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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